Fulton County Superior Court
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SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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| SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, on behalf of itself and its members *et al.*,<br>Plaintiffs<br><br>v.<br><br>STATE OF GEORGIA,<br>Defendant | ) | CIVIL ACTION 2022CV367796 |

**FINAL ORDER**

Plaintiffs seek a judgment declaring certain provisions of the Living Infants Fairness and Equality Act[1] unconstitutional -- and a permanent injunction prohibiting their enforcement. On 24-25 October 2022, the Court conducted a bench trial during which the parties presented evidence in support of their opposing positions. Pending at the time of the trial were a motion to dismiss filed by the State and a motion for partial judgment on the pleadings filed by Plaintiffs. On 15 November 2022, the Court entered an Order granting in part the motion for partial judgment on the pleadings, finding that several challenged provisions of the LIFE Act were void *ab initio* because they were unconstitutional when passed. The State promptly appealed and the Supreme Court stayed this Court's ruling while it considered the merits of the void *ab initio* decision. On 24 October 2023, the Supreme Court issued its final opinion in which it reversed this Court's

[1] 2019 Ga. Laws Act 234 (H.B. 481), hereinafter the LIFE Act.

ruling, abandoned decades of its own precedent,[2] and remanded the case for a ruling on the merits of Plaintiffs' constitutional claims. *State v. SisterSong Women of Color Reprod. Justice Collective*, 317 Ga. 528 (2023).

Plaintiffs' Claims

In Count I of their complaint, Plaintiffs seek a declaratory judgment that (a) our State Constitution's protections for liberty and privacy include a right to abortion and (b) various provisions of the LIFE Act violate Plaintiffs' patients' and members' rights to liberty, privacy, and equal protection. (Count I also requests an interlocutory injunction and temporary restraining order, which Plaintiffs further pressed in an emergency motion filed contemporaneously with their complaint. This Court dismissed that motion for lack

[2] The fundament upon which the majority rested its opinion -- the falsely modest precept that "the Court is not the source of the Constitution's meaning" -- guaranteed the outcome but misstates judicial (and political) reality. *State v. SisterSong Women of Color Reprod. Justice Collective*, 317 Ga. 528, 533 (2023). *Of course* the Constitution means what it means; such circularity tells us nothing. Ultimately, the Constitution means only what the courts tell us, and the Supreme Courts of the States and the Nation have the controlling voices in that discussion. Unsurprisingly (one would think), this results in *different* meanings being prescribed to the *same* words, phrases, and provisions as different minds and sensibilities take their turn discerning that meaning. In other words, the meaning of the Constitution is no more fixed than is the composition of the majority in the highest courts of the land -- especially when formerly bedrock principles such as *stare decisis* appear to be on the wane. Given that less majestic but undeniable reality, the more logical approach to assessing whether a legislative enactment is void at the time of its passage is to rely on the *then*-controlling Constitutional interpretations. *See, e.g., Strickland v. Newton County*, 244 Ga. 54, 55 (1979) ("The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted."); *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 617 (1953) ("The time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body; and if it is unconstitutional then, it is forever void."). Otherwise, "ghost" laws from years or decades past, enacted by legislators long since voted out of office, can spring to life when our ever-changing politics yields a new majority on our high courts, a majority which in turn imparts a new meaning to a supposedly unchanged and unchanging Constitution. But here we are.

of subject matter jurisdiction in an Order dated 15 August 2022, finding that Superior Courts may not enjoin allegedly unconstitutional laws or acts until after declaratory relief has been afforded.) Plaintiffs correspondingly seek a permanent injunction in Count II, prohibiting the State and its many agents from enforcing Sections 4, 10, and 11 of the LIFE Act as well as O.C.G.A. § 16-12-141(f) as amended by the LIFE Act.[3]

Plaintiffs' Patients' and Members' Rights
(a/k/a Women's Rights)

Plaintiffs[4] assert their patients and members enjoy liberty, privacy, and equal protection rights under the State Constitution that are violated by the challenged portions

[3] Plaintiffs challenge O.C.G.A. § 16-12-141(f) in both its amended and original, pre-LIFE Act form.

[4] Plaintiffs are "a coalition of Georgia-based obstetrician-gynecologists[,] reproductive health centers, and membership groups committed to reproductive freedom and justice." (Complaint at 6). Their ranks include six corporate and three individual reproductive health care providers; an advocacy group opposing "institutional policies, systems, and cultural practices that limit the reproductive lives of marginalized people" (*Id.* at 7); and a non-profit organization that "assists medical students and residents to maintain and expand access to abortion and family planning training" (*Id.* at 12). All Plaintiffs sue on their own behalf as well as on behalf of their patients and/or members. All Plaintiffs possess individual or organizational standing to sue on their own behalf, as they adequately allege in their complaint "(1) an injury in fact, (2) a causal connection between the injury and the alleged wrong, and (3) the likelihood that the injury will be redressed with a favorable decision." *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 382 (2022); *see also Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 435–36 (2007) (medical providers have standing to raise the constitutional rights of their patients). And, insofar as the alleged injury to the corporate or organizational Plaintiffs is uncertain or unclear -- which it is not -- the Court also finds that those Plaintiffs further possess *associational* standing to sue on behalf of their patients and/or members, as they have additionally sufficiently shown that their "members would otherwise have standing to sue in their own right; the interests the association seeks to protect are germane to the association's purpose; and neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members." *Sawnee Elec. Membership Corp. v. Georgia Dep't of Revenue*, 279 Ga. 22, 24 (2005); *but see Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, 315 Ga. 39, 66 n.24 (2022) (questioning whether the federal concept of associational standing has properly been incorporated into Georgia constitutional standing jurisprudence).

of the LIFE Act. Plaintiffs' liberty right is established in Article I, Section I, Paragraph I of the Constitution. Their right to equal protection of the laws is similarly plainly set forth in the Constitution at Article I, Section I, Paragraph II. The more elusive and amorphous right to privacy has "a long and distinguished history" in our State, but it is a history based on judicial interpretation and application of the constitutional right to liberty, rather than on some explicit constitutional language about privacy.[5] *Powell v. State*, 270 Ga. 327, 329 (1998). Regardless of its indirect constitutional provenance, in Georgia, "privacy is considered a fundamental constitutional right." *King v. State*, 272 Ga. 788, 789 (2000) (*King I*).

The LIFE Act

On 4 April 2019, the Georgia Legislature passed H.B. 481, entitled the "Living Infants Fairness and Equality (LIFE) Act." Governor Kemp signed it on 7 May 2019 and it took effect -- or at least the constitutional portions of it did -- on 1 January 2020.[6] The

[5] In this way, Georgia is not unique. Most state constitutions do not contain an express right to privacy, although Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington have all enshrined the right. ALASKA CONST. art.1, § 22; ARIZ. CONST. art. 2, § 8; CAL. CONST. art. 1, § l; FLA. CONST. art. 1, § 12; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; and WASH. CONST. art. I, § 7. Where Georgia *is* unique is its position as the "pioneer in the realm of the right of privacy," as our Supreme Court was the first in the land to recognize a constitutional right to privacy. *Powell v. State*, 270 Ga. 327, 329 (1998) (referring to *Pavesich v. New England Life Ins.*, 122 Ga. 190 (1905)).

[6] The Act enjoyed only a very brief initial tour of duty as the law of Georgia. On 13 July 2020, a federal District Court judge enjoined the State from enforcing H.B. 481 "in its entirety," finding, unsurprisingly, that it was fundamentally inconsistent with then-controlling federal constitutional law a/k/a *Roe v. Wade* and its progeny. *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297,

LIFE Act consists of sixteen sections, only three of which Plaintiffs challenge as infringing on their rights (or their members' rights): Sections 4, 10, and 11. Section 4 of the LIFE Act amended O.C.G.A. § 16-12-141 to, among other things, criminalize abortions occurring after the embryo generates a "detectable human heartbeat",[7] a development which both sides in this litigation agree typically occurs around six weeks after the mother's last menstrual period.[8] Section 10 amended O.C.G.A. § 31-9B-2, concerning a physician's obligations when performing abortions, to require doctors to make "a determination of the presence of a detectable human heartbeat … of an unborn child" before performing any abortion (absent a medical emergency or a medically futile pregnancy).[9] Finally, Section 11 amended O.C.G.A. § 31-9B-3 to add a requirement that any physician who performs an abortion after detecting a fetal heartbeat must report to the Department of Public Health the exception to the ban imposed by Section 4 of the Act that applied to justify the otherwise illegal procedure. The Act wrought other statutory changes

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1328 (N.D. Ga. 2020), *rev'd and vacated sub nom. SisterSong Women of Color Reprod. Justice Collective v. Governor of Georgia*, 40 F.4th 1320 (11th Cir. 2022).

[7] This statutory threshold for life is more particularly defined as "embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac." O.C.G.A. § 16-12-141(a)(2).

[8] Section 4 also added several exceptions to the post-embryonic heartbeat abortion ban -- to include certain non-mental health medical emergencies and rape or incest (but only if a police report is filed) -- and expanded prosecutors' access to women's health records to both the circuit in which the procedure occurred and the circuit in which the woman who underwent the procedure resides.

[9] The Court has already found that Section 10 passes constitutional muster; Plaintiffs are denied their requested relief as to that provision. *See* 15 November 2022 Order at 7-8.

as well, all consistent with its policy theme that unborn children are "natural persons," but its fundamental alteration to Georgia law was its extreme narrowing of the window of time within which women have the legal ability to end a pregnancy from roughly twenty weeks (*i.e.*, viability) down to a mere six weeks, a point at which many -- if not most -- women are completely unaware or at best unsure if they are pregnant.

The Issue

Whether one couches it as liberty or privacy (or even equal protection), this dispute is fundamentally about the extent of a woman's right to control what happens to and within her body. The baseline rule is clear: a legally competent person has absolute authority over her body and should brook no governmental interference in what she does -- and does not do -- in terms of health, hygiene, and the like.[10] *Cruzan v. Director, MDH*, 497 U.S. 261, 269 (1990) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body"). Unsurprisingly, the manner in which Georgia's courts have interpreted and applied these provisions of the State Constitution (and the rights flowing from them) firmly supports such a position. Gluttony and self-deprivation are both constitutionally protected lifestyles. People are free to tattoo or pierce any and every square inch of their skin. And, ordinarily, one can pursue -- or refuse -- medical care, elective or

[10] There is the vaccine exception, wherein the government can condition some receipt of benefit (such as public education or Medicaid/Medicare coverage) on the administration of vaccines or other preventative medicine -- or outright mandate the treatment through a valid exercise of state police power. *See, e.g., Biden v. Missouri,* 595 U.S. 87 (2022); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

essential.

But here, in this case and this debate, there is one more important fact -- the pregnancy -- that changes the constitutional analysis. At some point, the pregnancy acquires its own rights that deserve protection, protection that can conflict with the mother's exercise of her rights. We struggle mightily -- and not always peaceably -- with determining when that point arrives. For some, that moment is conception: when sperm fertilizes egg and a zygote is formed -- a single cell with a unique combination of DNA drawn from each parent -- a new life begins, a life vested with all the protections our Constitution affords living human beings. *See, e.g., LePage v. Ctr. for Reprod. Med., P.C.*, --- So. 3d. ---, SC-2022-0515, 2024 WL 656591 at *16 (Ala. Feb. 16, 2024) ("We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect His likeness.") (Parker, C.J., concurring). For many others, including Georgians until the LIFE Act was passed, that tipping point is viability, when the fetus -- now fully formed -- can survive outside the mother. *See, e.g.,* Conn. Gen. Stat. Ann. § 19a-602(a) ("The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the patient"); 775 Ill. Comp. Stat. Ann. 55/1-25; Me. Rev. Stat. tit. 22, § 1598.

Our Legislature -- or at least the Legislature as it was composed back in 2019 -- has, through the now-resurrected LIFE Act, offered yet another perspective: life begins with the

establishment of a pre-fetal circulatory system.[11] That point, according to the LIFE Act, is when embryo and mother become co-equal, enjoying the same rights under the Constitution.[12] Thus in Georgia today a pregnancy that persists beyond the detection of this initial heartbeat -- that is, a post-embryonic cardiac activity pregnancy (PECAP) -- may not be terminated unless one of several narrow exceptions applies. Indeed, anyone performing or facilitating a non-exempt PECAP termination is, under the LIFE Act, guilty of a felony offense.[13] O.C.G.A. § 16-12-140. And *that* creates the issue to be decided here: how to balance the rights of a not-yet-viable fetus against the rights of the only person in this great wide world who can -- by choice or by legislative imposition -- maintain that

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[11] This pre-fetal circulatory system would not be readily recognizable as such to most. The "heart" is a tiny cluster of cells that periodically pulse, pushing blood through the quarter-inch embryo that still sports a vestigial tail.

[12] The arbitrariness of this delineation -- designating the embryonic "heartbeat" as the start of life -- was highlighted by the medical evidence presented at trial. As medical science defines it, a true human heartbeat requires an actual four-chambered heart, something which does not develop until 17-20 weeks of gestation, a time far closer to viability than the start of rudimentary blood circulation in week six.

[13] To be clear, both pregnant women *and* medical professionals can be criminally liable under this statutory scheme. O.C.G.A. § 16-12-140(a) defines the offense of "criminal abortion" as follows: "A person commits the offense of criminal abortion when, in violation of Code Section 16-12-141, he or she administers any medicine, drugs, or other substance whatever to any woman or when he or she uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion." Thus, a pregnant woman who administers to herself "medicine, drugs, or other substance" that she has procured on her own, in an effort to end her pregnancy at, say, eight weeks -- when she first learned that she was pregnant but after the embryonic heartbeat had commenced -- is subject to prosecution as readily as a doctor at SisterSong who did the same. And there is no limitation in O.C.G.A. § 16-12-140 that would prevent a zealous prosecutor from pursuing charges against the woman as a party to or co-conspirator in the crime that she helped her medical provider commit.

pregnancy until it is viable?[14]

Liberty/Privacy Right

Plaintiffs in stating their claim properly invoke the very first provision of our State's Constitution: "No person shall be deprived of life, liberty, or property except by due process of law." 1983 Georgia Constitution, Art. I, Sec. I, Par. I. From this language springs Georgians' right to privacy -- or, as the Court in *Pavesich* more aptly put it, our "liberty of privacy." *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 72 (1905). It is a fundamental right "recognized as having a value so essential to individual liberty in our society that its infringement merits careful scrutiny by the courts." *King I*, 272 Ga. at 789 (punctuation and citation omitted). It is also much broader than its federal counterpart: "the 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive that the right of privacy protected by the U.S. Constitution." *Powell*, 270 Ga. at 330. It is not an absolute right, however: Georgians enjoy their right "to be let alone" only so long as they are not interfering with the rights of other individuals or of the public. *Pavesich*, 50 S.E. at 71.

The State argues that Plaintiffs' privacy right claim fails at the starting gate for two reasons. First, the State asserts that the right to privacy has never included the right to have

[14] Remarkably, this appears to be an issue of first impression in Georgia. Because of prior controlling federal precedent (*Roe v. Wade*, 410 U.S. 113 (1973), and its progeny), our state courts have not been called upon to address this tension directly, other than in references that are essentially dicta, such as the observation that "Georgia itself cannot unduly interfere with a woman's constitutional right to obtain an abortion." *Etkind v. Suarez*, 271 Ga. 352, 354 (1999).

an abortion.[15] While this is true on a tritely literalistic level -- the word "abortion" is indeed nowhere to be found in the Georgia Constitution -- that position misstates the question: does a Georgian's right to liberty of privacy encompass the right to make personal healthcare decisions? Plainly it does.[16] *See, e.g., State v. McAfee*, 259 Ga. 579 (1989);

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[15] Except of course for the many decades of apparent supreme judicial confusion that the State refers to vaguely derisively as "the era of *Roe.*"

[16] This Court says "plainly" because the Georgia Supreme Court has repeatedly interpreted and applied the State Constitution as such. But that right -- the right to make personal healthcare decisions, to exercise dominion over one's body -- is not obvious, in a "plain" sense. Indeed, the constitutional language from which it springs -- Article I, Section I, Paragraph I of the present Georgia Constitution -- enshrines only the rights to life, liberty, and property. From this core trio of rights various related fundamental rights are necessarily and continuously extrapolated as constitutional questions arise. The interpretive challenge for the courts is in understanding what is encompassed in the concept of liberty. Originalists and textualists insist that courts rely on the provision's "original public meaning," that is, the meaning the provision had at the time of the Constitution's ratification. *Elliott v. State*, 305 Ga. 179, 181 (2019); *Lathrop v. Deal*, 301 Ga. 408, 440 (2017) ("we must seek to ascertain the way in which the text most reasonably would have been understood at the time of its adoption"). For many provisions, that means our current Constitution, ratified in 1982. Georgia, however, is not just the Peach State, it is also the Land of Constitutional Fecundity: we have had not one or two but *ten* different constitutions. So textualism requires a journey further back in time if the present constitutional language in question was imported from a previous version. And that is the case here: that right to liberty dates back to the State's fifth constitution, ratified in 1861 -- the final antebellum constitution. Article I, Paragraph IV, of the 1861 Constitution first staked out the protections of life, liberty, and property for the citizens of Georgia. Given the presumption of continuity afforded to unchanged provisions of subsequent constitutions, adherents of textualism look to the "original public meaning" of liberty back in 1861. *Session v. State*, 316 Ga. 179, 192 (2023); *Ammons v. State*, 315 Ga. 149, 163 (2022) (proper constitutional exegesis "requires careful attention to not only the language of the clause in question, but also its broader legal and historical context, which are the primary determinants of a text's meaning"). The obvious problem with this interpretive approach -- and the flaw in the confusing assertion that "when a court engages in judicial review, the court does not supply the Constitution with a meaning the Constitution does not already have, but instead attempts to discern the meaning of the Constitution through interpretation," *SisterSong*, 317 Ga. at 533 -- is that the Plaintiffs whose rights are at issue in this litigation had no (or very limited) rights when the constitutional provision was adopted. "Liberty" for white women in Georgia in 1861 did not encompass the right to vote (and thus to ratify the State's new constitution). And of course liberty did not exist at all for Black women in Georgia in 1861. Thus, any rooting around for original public meaning from that era would yield a myopic white male perspective on an issue of greatest salience to women, including women of color; certainly that is not what

*Zant v. Prevatte*, 248 Ga. 832 (1982). Second, the State argues that because any termination of a pregnancy necessarily interferes with the rights of "another," *i.e.*, the fetus[17], the woman's privacy right must yield. But such interference does not mean the discussion is closed. It means instead that the respective rights must be balanced against each other.

Even here the State insists the calculus is simple and the answer clear: the fetal right to life must always trump the woman's right to make her own decisions as to her health and well-being, as what could be more fundamental than the right to life? Setting aside the very real scenarios in which continuing the pregnancy *does* threaten the woman's right to life, the State's "life" versus "liberty" juxtaposition is simply not apt, for the LIFE Act

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constitutional interpretation of any legitimate stripe ought to do. *See Access Independent Health Services, Inc., D/B/A Red River Women's Clinic et al. v. Drew H. Wrigley et al.,* at ¶ 40, Docket 08-2022-CV-01608 (N.D. Dist. Ct. Sept 12, 2024) ("this Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the laws at that time, likely would not have recognized the interests at issue in this case because, at that time, women were not treated as full and equal citizens. The reality is that 'individuals' did not draft and enact the North Dakota Constitution. Men did. And many, if not all, of the men who enacted the North Dakota Constitution, and who wrote the state laws of the time, did not view women as equal citizens with equal liberty interests."). If we fast forward to the *same* language in our current Constitution, ratified in 1982 -- at a time when liberty and privacy in fact and in law included the right of a woman to make her own reproductive health choices up to the point of viability -- then we have an original public meaning that incorporates precisely the rights Plaintiffs are now asserting. But remember: "Although the meaning of a constitutional provision does not alter over time, judicial interpretations of that meaning sometimes do." *SisterSong*, 317 Ga. at 533 n.10. So liberty will apparently mean what it has always meant since 1861; courts may just "interpret" that meaning in different ways as the composition of those courts changes.

[17] The Court is purposefully and for simplicity's sake using the term "fetus" loosely here to refer to the early stage of pregnancy. To be clear, the record established at trial is that the pregnancy remains a tiny ungendered embryo until the ninth week, nearly a month after the LIFE Act's prohibition has taken hold.

criminalizes a woman's deeply personal and private decision to end a pregnancy at a time when her fetus cannot enjoy any legislatively bestowed right to life *independent of the woman carrying it*. Put differently, the uncontroverted evidence from the trial of this case is that a pre-viability fetus survives only through the woman choosing -- or being forced by law -- to carry it at least to the 22nd or 23rd week of her pregnancy. Unlike a newborn baby or a catatonic elder, both of whom our society should and does support if family and friends have stepped back from their expected roles as caregivers, for a pre-viability fetus there is no one else who can assume that woman's role and keep the pregnancy alive and healthy during those five long months.

Because the LIFE Act infringes upon a woman's fundamental rights to make her own healthcare choices and to decide what happens to her body, with her body, and in her body, the Act must serve a compelling state interest and be narrowly tailored to achieve that end. *State v. Jackson*, 269 Ga. 308, 310 (1998). The Act fails the second[18] half of that two-part test: there is nothing narrow about a law so blunt that it forces a woman to allow a fetus grow inside her for months after she has made the difficult and deeply personal decision not to bring the pregnancy to term. Indeed, as the trial testimony made clear, the Act's prohibitions against certain healthcare choices take effect before most women even know they are pregnant and so before they can begin to contemplate whether having a child

[18] The LIFE Act readily satisfies the first half of the test, as "respect for and preservation of prenatal life at all stages of development" is a legitimate and compelling state interest. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022).

is safe and sustainable for the mother and, if relevant, for her family. While the State's interest in protecting "unborn" life is compelling, until that life can be sustained *by the State* -- and not solely by the woman compelled by the Act to do the State's work -- the balance of rights favors the woman.[19]

Before the LIFE Act, Georgia law required a woman to carry to term any fetus that was viable, that had become something that -- or more accurately *someone* who -- could survive independently of the woman. That struck the proper balance between the woman's right of "liberty of privacy" and the fetus's right to life outside the womb. Ending the pregnancy at that point would be ending a life that our community collectively can and would otherwise preserve; no one person should have the power to terminate that. Pre-viability, however, the best intentions and desires of society do not control, as *only* the pregnant woman can fulfill that role of life support for those many weeks and months. The question, then, is whether she should now be forced by the State via the LIFE Act to do so? She should not. Women are not some piece of collectively owned community property the disposition of which is decided by majority vote. Forcing a woman to carry an unwanted,

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[19] There is also something awkwardly arbitrary about the LIFE Act's six week dividing line, an arbitrariness that only highlights the wisdom and practicality of viability as the proper separation point between a woman's right to choose and society's right to intervene. The State was unable to articulate why a four- or five-week-old unborn child's life was not worth enough to protect by way of a statutory ban on *all* pregnancy terminations, regardless of fetal age. A five-week-old pregnancy is no more viable that a nine-week-old, but women are free to end such pregnancies (if they can detect them). Similarly, the State could not articulate how the life created by a sexual assault was worth less than one that was consensually conceived. Those embryos and fetuses did not choose their creation story; they should be equally worthy of statutory protection if the State's focus truly is on "Living Infant *Fairness*." It appears instead that the State has seized upon a point in gestation that has political salience, rather than medical or moral salience.

not-yet-viable fetus to term violates her constitutional rights to liberty and privacy, even taking into consideration whatever bundle of rights the not-yet-viable fetus may have.[20]

Fortunately, the record before the Court is that the majority of pregnancies involve women who sought to get pregnant, who want to fulfill that role of life-giver with that pregnancy, and who need no legislative prod to do so. But the record is no less clear that for many women, their pregnancy was unintended, unexpected, and often unknown until well after the embryonic heartbeat began. Yet that's too late under the LIFE Act's strictures: these women are now forbidden from undoing that life-altering change of circumstances -- before they even knew the change had occurred.

For these women, the liberty of privacy means that they alone should choose whether they serve as human incubators for the five months leading up to viability. It is not for a legislator, a judge, or a Commander from *The Handmaid's Tale* to tell these women what to do with their bodies during this period when the fetus cannot survive

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[20] A related construct employed by courts in other jurisdictions that have wrestled with balancing the rights of the mother with the rights of her fetus is the concept of the right to bodily integrity -- a correlative right to the right to privacy. *See, e.g., Planned Parenthood of Michigan v. Attorney General of the State of Michigan*, 2022 WL 7076177, at *7 (Mich.Ct.Cl. 2022) ("The right to bodily integrity encompasses the freedom to decide how one will use her own body, a right independent of that of privacy generally."). The right to bodily integrity is referenced in Georgia caselaw only fleetingly and when it is, it is typically in discussions contrasting "public" rights with "private" rights. *See, e.g., Kennestone Hosp., Inc. v. Emory Univ.*, 318 Ga. 169, 178 (2024) ("Private rights … traditionally [have] been understood to refer to an individual's common law rights in property and bodily integrity…"). Insofar as Georgia law does recognize a right to bodily integrity, that right too is infringed by the LIFE Act. Forcing a woman to carry to term an unwanted pregnancy -- with the many concomitant physical, hormonal, and emotional changes involved -- plainly constitutes "an invasion of bodily integrity [which] implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013), quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985).

outside the womb any more so than society could -- or should -- force them to serve as a human tissue bank or to give up a kidney for the benefit of another.[21],[22] Considering the compelling record evidence about the physical, mental, and emotional impact of unwanted pregnancies on the women who are forced by law to carry them to term (as well as on their other living children), the Court finds that, until the pregnancy is viable, a woman's right to make decisions about her body and her health remains private and protected, *i.e.*, remains

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[21] There is an uncomfortable and usually unspoken subtext of involuntary servitude swirling about this debate, symbolically illustrated by the composition of the legal teams in this case. It is generally men who promote and defend laws like the LIFE Act, the effect of which is to require *only* women -- and, given the socio-economic and demographic evidence presented at trial, primarily poor women, which means in Georgia primarily black and brown women -- to engage in compulsory labor, *i.e.*, the carrying of a pregnancy to term at the Government's behest. *See Public Opinion on Abortion*, Pew Research Center, https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/#views-on-abortion-1995-2024 (last visited 29 September 2024). (The trial record also showed that wealthier women -- which statistically means white women -- are much more able to travel from Georgia to jurisdictions in which pre-viability pregnancies can be ended without fear of criminal prosecution.) While the Court does not find that the LIFE Act violates the state and federal constitutional prohibitions against involuntary servitude (*see, e.g.*, Ga. Const. at Article I, Section I, Paragraph XXII), it is important to acknowledge the degree to which such laws compel a subset of our society to, against their will, labor for what the Legislature has decided is the betterment of society. This is eerily reminiscent of earlier times about which insufficient discussion is had when reviewing the "history" of laws surrounding reproductive rights in the United States. *See, e.g.,* Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 The University of Chicago Legal Forum 191 (2022).

[22] There is also an argument that the LIFE Act -- or at least Section 4 of it -- is a sweeping bill of attainder, prohibited by Article I, Section 1, Paragraph X of the Georgia Constitution. "A bill of attainder is a 'legislative act, no matter what its form, that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.'" *Cook v. Smith*, 288 Ga. 409, 413 (2010), quoting *United States v. Lovett*, 328 U.S. 303, 315 (1946) (punctuation omitted). Punishment in this context includes "[t]he deprivation of any rights, civil or political." *Fulton v. Baker*, 261 Ga. 710, 712 (1991), quoting *United States v. Brown*, 381 U.S. 437, 442 (1965). Pregnant women who seek PECAP terminations are easily ascertainable members of the group of all pregnant women. The LIFE Act deprives them of civil rights (liberty, privacy, bodily autonomy, etc.) by way of legislative fiat rather than judicial trial. Indeed, if these women find themselves in a "judicial trial" court in connection with the LIFE Act, it is because they are criminal defendants facing felony prosecution.

her business and her business alone. When someone other than the pregnant woman is able to sustain the fetus, then -- and only then -- should those other voices have a say in the discussion about the decisions the pregnant woman makes concerning her body and what is growing within it.[23]

Equal Protection

"The Equal Protection Clause of the Georgia Constitution … requires that the State treat similarly situated individuals in a similar manner." *Jackson v. Raffensperger*, 308 Ga. 736, 741 (2020) (punctuation and citation omitted).[24] Put conversely, the Equal Protection Clause "prohibit[s] the state from creating a classification which arbitrarily divides similarly situated citizens into different classes and treats them differently." *Stegall v. Leader Nat. Ins. Co.*, 256 Ga. 765, 766 (1987). It is Plaintiffs' burden to establish that they are "similarly situated to members of a class who are treated differently" than Plaintiffs are under the terms of the LIFE Act. *Walker v. Cromartie*, 287 Ga. 511, 512 (2010); *see also Georgia Dep't of Human Res. v. Sweat*, 276 Ga. 627, 630 (2003) ("It is fundamental that no equal protection violation exists unless legislation treats similarly-situated individuals differently."). A statute challenged on equal protection grounds

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[23] *See Preterm-Cleveland v. Yost*, 2022 WL 16137799, (Ohio Com.Pl. 2022) (finding that Ohio's "heartbeat" law banning most pregnancy terminations after a detectable embryonic heartbeat violated "the fundamental right to privacy, procreation, bodily integrity and freedom of choice in health care decision making").

[24] That clause reads: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." 1983 Georgia Constitution, Art. I, Sec. I, Par. II.

> is tested under a standard of strict judicial scrutiny if it either operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right. If neither a suspect class nor a fundamental right is affected by the statute, the statute need only bear a rational relationship to some legitimate state purpose.

*Drew v. State*, 285 Ga. 848, 850 (2009) (punctuation and citations omitted). Here, the rights involved -- liberty, privacy, bodily integrity, etc. -- are all fundamental, so the challenged portions of the LIFE Act must survive strict scrutiny if, in their application, they have a differential impact on similarly situated individuals. Under strict scrutiny review, differential treatment "can be justified only when it is sufficiently related to a compelling state interest." *Nicely v. State*, 291 Ga. 788, 792 (2012).

Plaintiffs posit two classes, the members of each of which they contend are impermissibly segregated and treated differently under the LIFE Act. The first consists of all pregnant women. That is, Plaintiffs argue that the LIFE Act treats pregnant women who choose to carry their pregnancies to term differently than pregnant women who seek to end their pregnancies before viability. Under the LIFE Act, women who elect to proceed with their pregnancy do not have their healthcare choices made for them by the State. However, under that same set of laws, women who would otherwise elect to have a PECAP termination encounter unwanted and unwarranted State interference with their most intimate and personal decisions about what to do with their health, their bodies, and their families. This is, at heart, simply another way of framing the "liberty of privacy" discussion from above. Either women in Georgia are, prior to fetal viability, free to make personal healthcare decisions about the condition of their bodies without State interference

or they are not. If they are, then the LIFE Act impermissibly and arbitrarily impedes the exercise of that fundamental right by some members of a class and not others.[25]

The second class Plaintiffs identify is women who, because of a medical emergency, seek relief from the LIFE Act's restrictions on their personal healthcare choices. As explained above in n.8, Section 4 of the LIFE Act allows for several exceptions to its ban on PECAP terminations; one of these is "medical emergencies." The Act defines a "medical emergency" to be "a condition in which an abortion is necessary in order to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman." O.C.G.A. § 16-12-141(a)(3). Specifically *excluded* from the definition of medical emergency are diagnoses of "mental or emotional" conditions, to include a diagnosis that the pregnant woman will engage in self-harm if forced to proceed with the pregnancy. *Id.* It is this divide that Plaintiffs challenge with their second equal protection claim: treating pregnant women with mental health emergencies differently than women with physical health emergencies. The Court agrees that this (mis)treatment of women with diagnosed mental health emergencies violates the Equal Protection Clause of the Georgia Constitution: there is no basis --

[25] If a higher court determines that women in Georgia do not enjoy such a fundamental right before fetal viability then, as discussed, "the most lenient level of judicial review—rational basis—applies." *Taylor v. Devereux Found., Inc.*, 316 Ga. 44, 83 (2023) (citation omitted). "And because statutes are presumed to be constitutional, the party challenging the law must negate every conceivable basis that might support it." *Id.* at 84. Put conversely, the State need only show a rational relationship to a legitimate state purpose to overcome the equal protection challenge, which here it has done. A law that reduces the number of PECAP terminations in Georgia is rationally related to the legitimate state interest described in *Dobbs*: "respect for and preservation of prenatal life at all stages of development".

rational, compelling, or sensical -- to distinguish between diagnosed medical emergencies involving the brain (an essential human organ if ever there was one) versus the heart or the lungs or the liver -- *all* of which can result in serious bodily harm or death to the mother. A law that saves a mother from a potentially fatal pregnancy when the risk is purely physical but which fates her to death or serious injury or disability if the risk is "mental or emotional" is patently unconstitutional and violative of the equal protection rights of pregnant women suffering from acute mental health issues.[26, 27]

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[26] This statutory language effectively codifies a pernicious and persistent discrimination against people suffering from mental illnesses, categorizing (and stigmatizing) them as somehow not being truly sick or in need of care. "If it's not bleeding, it's not serious."

[27] It became apparent during the trial (as it has in jurisdictions elsewhere with similarly worded medical exceptions) that the medical emergency exception to the PECAP termination ban is susceptible to a vagueness challenge. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Johnson v. Athens-Clarke Cnty.*, 272 Ga. 384, 385 (2000), quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). The first half of the statutory definition of medical emergency is plain: the pregnancy may be terminated if failure to do so will kill the woman. The second half eluded any consistent definition from the various medical professionals who testified or offered affidavits. Is a woman's left eye alone a major bodily function? Would the risk of losing the vision in only one eye as a result of being forced to bring to term a pregnancy be reason enough to authorize the medical emergency exception? Or would a total loss of sight be required? Are our eyes even a "major bodily function," as opposed to the circulatory system or respiratory system? According to several experts, uncertainty as to what level of medical intervention is legally permissible and when it might safely (from a legal perspective) be afforded to the pregnant patient -- that is, how "substantial" must the "impairment" be to whatever a "major bodily function" is? -- will result in pain, suffering, and, ultimately, tragedy (and concomitantly a denial of due process). But, as our constitutional vagueness law stands now, until a pregnant woman (or her doctor) is thrust into that untenable situation, thereby by yielding an "as-applied" challenge, the issue will remain unaddressed. *See Smallwood v. State*, 310 Ga. 445, 447 (2020), quoting *Daddario v. State*, 307 Ga. 179, 188 (2019) ("vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand").

The Rape or Incest Exception

Along with the medical emergency exception, the LIFE Act authorizes relief from its ban on PECAP terminations in the case of rape or incest. Specifically, O.C.G.A. § 16-12-141(b)(2) permits a PECAP termination if the probable gestational age of the fetus is 20 weeks or less (*i.e.*, is not yet viable) "and the pregnancy is the result of rape or incest in which an official police report has been filed alleging the offense of rape or incest." This enactment takes a fairly common[28] exception to bans on pregnancy terminations and adds a peculiarly cynical proviso that suggests the Legislature was somehow concerned that women would lie about their father having sex with them in order to obtain a needed medical procedure. Plaintiffs challenge this reporting requirement as placing an impermissible burden on the exercise of a fundamental right as well as being an improper intrusion into the privacy of the victim of sexual predation.

The debate over O.C.G.A. § 16-12-141(b)(2) is moot if, as Plaintiffs argue and as this Court has found, the bundle of rights comprising the concept of liberty (privacy, bodily autonomy, etc.) includes a woman's right to make her own healthcare choices about a pre-viability pregnancy. In such a world -- *see, e.g.*, California, Connecticut, Illinois, Minnesota, New York, Oregon, etc. -- the victim of rape or incest need not share her trauma with the local sheriff, the chief of police, or anyone else should she seek to end her

[28] *See, e.g.*, Ind. Code Ann. § 16-34-2-1(a)(2) (no law enforcement reporting requirement); Neb. Rev. Stat. Ann. § 71-6915(3)(b) (same); N.C. Gen. Stat. Ann. § 90-21.81B (same); S.C. Code Ann. § 44-41-650 (requires physician but not patient to report sexual assault).

pregnancy before viability. Rather, it would be a decision left to the victim and her medical provider, just like any other important medical procedure the woman might seek: private and personal.

On the other hand, if the Court is mistaken and women in Georgia are not free to control what happens to and within their bodies after embryonic cardiac activity has begun but before a fetus is viable, then the reporting requirement imposed by O.C.G.A. § 16-12-141(b)(2) stands. While that requirement imposes a burden on women seeking to invoke the rape/incest exception to PECAP terminations, there is a (minimally) rational basis for the burden: ensuring that no one is unlawfully exploiting the exception. If the State is going to exclude a category of persons (*i.e.*, victims of rape or incest) from the reach of a criminal statute, surely it is entitled to set the conditions for such an exclusion. While it is not difficult to posit real-life scenarios in which the reporting requirement could render the exception useless,[29] the Court does not find that the burden imposed is unconstitutional *if* Section 4 of the LIFE Act is found to be constitutional. It is not a ban or a bar, but a burden,

[29] Take, for example, a pregnant twelve-year-old who was raped by her mother's live-in boyfriend (who is the primary source of financial support for the household). Under the LIFE Act, she cannot end the pre-viability pregnancy unless she tells the police all about what happened. What might seem like common sense to someone not living the life of that twelve-year-old girl -- call the police and get that child molester locked up! -- could be much more complicated for the girl (and her mother). Perhaps the boyfriend has threatened them and they are choosing to remain silent but alive. Perhaps mother and daughter fled that fraught situation but are not convinced they would remain safe if the authorities got involved. Perhaps the boyfriend's parents have promised to support the girl and her mother if they do not report the crime. For victims young and old beset by fear and/or economic vulnerability, the reporting requirement of the LIFE Act's rape and incest exception could prove insurmountable.

a burden the Legislature was empowered to impose.[30]

O.C.G.A. § 16-12-141(f)

Subsection (f) of O.C.G.A. § 16-12-141 instructs that "Health records shall be available to the district attorney of the judicial circuit in which the act of abortion occurs or the woman upon whom an abortion is performed resides." That's it. No definition of "health records." No explanation of the means by which the district attorney obtains such records: warrant, subpoena, demand letter, e-mail? And no mention of any notice to be provided to the "woman" whose "health records" have been made "available." Given this language, Plaintiffs contend that the provision unconstitutionally violates their patients' right to privacy by empowering prosecutors to obtain personal medical information without sufficient process. Plaintiffs are correct.

As this Court noted in an earlier Order, there is a strong vein of constitutional jurisprudence protecting personal medical records. *See, e.g., King I*, 272 Ga. at 790 ("Because Georgia recognizes an even broader concept of privacy [than the right of privacy afforded by the Federal Constitution], the personal medical records of this state's citizens clearly are protected by that right as guaranteed by our constitution."). For a provision like

[30] Importantly, the reporting requirement is not mandatory. In that way, it is less burdensome than other valid laws involving the reporting of suspected criminal activity. For example, public educators must report crimes committed by students at school (O.C.G.A. § 20-2-1184) and a broad swath of caregivers from podiatrists to dentists to family therapists must report the suspected abuse of minors (O.C.G.A. § 19-7-5). Failure to report under these statutory schemes is grounds for misdemeanor prosecution. The LIFE Act's reporting requirement in contrast is merely a condition precedent to receiving an exclusion from a criminal statute.

subsection (f) to survive the strict scrutiny it must receive -- because it impinges upon a patient's right to privacy -- it must further a compelling State interest and be narrowly drawn to achieve that interest. *Powell*, 270 Ga. at 333 & n. 5. While law enforcement and public safety are both recognized compelling State interests, *King v. State*, 276 Ga. 126, 128 (2003) (*King II*), this provision's scope is anything but narrow: purportedly focused on abortion, the statute empowers a prosecutor to obtain *all* "health records" of a patient.

Indeed, counsel for the State struggled to defend subsection (f) in court, acknowledging that there were "weird issues" around it. If by "weird" counsel meant "constitutional" then the Court agrees. One of these "issues" is the fact that the law does not define "health records" and so is unconstitutionally overbroad. Can the district attorney get the *entire* medical history of the woman? Nothing in the statute appears to prohibit that. If the abortion was part of a larger medical intervention, are records concerning the other procedures disclosed? The statute is silent. Indeed, the statute does not even limit the district attorney to obtaining health records from medical facilities; consistent with the plain[31] language of the provision, the district attorney apparently could dispatch an investigator to "the woman's" home to demand immediate and complete access to the health records she possesses.

This leads into the "weird" issue of lack of process required to obtain these "health

[31] "If the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end." *Golden v. Floyd Healthcare Mgmt., Inc.*, --- Ga. ---, 904 S.E.2d 359, 364 (2024) (punctuation and citation omitted).

records." Subsection (f) is directive: "Health records *shall be available* to the district attorney…" (emphasis added). But we know that such records are private and enjoy constitutional and statutory protections. Indeed, O.C.G.A. § 24-12-1(a) shields patient medical information from disclosure by doctors, hospitals, and health care facilities unless "authorized or required by law, statute, or lawful regulation" or upon issuance of an "appropriate court order or subpoena".[32] O.C.G.A. 16-12-141(f) -- a statute -- appears to require the disclosure of "health records" to district attorneys, thereby obviating the need for any process under O.C.G.A. § 24-12-1(a). That does not square with *King I* or *King II* and is fatal to the provision as written. There is nothing so urgent or important to the State about the medical records of women who end pregnancies that the privacy rights of those women -- and the Fourth Amendment protections that attach to those rights -- can be bulldozed away by statutory enactment.

## Conclusion

> The authors of our Constitutions, state and federal,
>
> > entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

*Obergefell v. Hodges*, 576 U.S. 644, 664 (2015). Plaintiffs have made such a claim and this Court has addressed it. A review of our higher courts' interpretations of "liberty"

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[32] Building on its holdings in *King I* and *King II*, the Supreme Court recently held in *Gates v. State*, 317 Ga. 889 (2023), that, under O.C.G.A. § 24-12-1, prosecutors seeking patient medical records from a hospital or other care facility must obtain a search warrant; a subpoena or mere court order is insufficient.

demonstrates that liberty in Georgia includes in its meaning, in its protections, and in its bundle of rights the power of a woman to control her own body, to decide what happens to it and in it, and to reject state interference with her healthcare choices. That power is not, however, unlimited. When a fetus growing inside a woman reaches viability, when society can assume care and responsibility for that separate life, then -- and only then -- may society intervene. An arbitrary six-week ban on PECAP terminations is inconsistent with these rights and the proper balance that a viability rule establishes between a woman's rights of liberty and privacy and society's interest in protecting and caring for unborn infants.

Accordingly, Section 4 of the LIFE Act is hereby DECLARED unconstitutional.[33] The State and all its agents, to include any County, Municipal, or other local authority, are once again ENJOINED from seeking to enforce in any manner the LIFE Act's PECAP termination ban in Georgia. Because Section 4 is stricken and thus its amendments to O.C.G.A. § 16-12-141 are gone, Section 11 necessarily fails as well, as a woman does not require a legislatively bestowed exception to pursue a pre-viability PECAP termination. Finally, O.C.G.A. 16-12-141(f) is DECLARED unconstitutional. It, too, shall not be enforced by the State or any of its agents.

The law of Georgia reverts to what was (and remains) constitutional in this State at

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[33] The Court has addressed Plaintiffs' equal protection challenges in this Order as well. However, those conclusions are mooted by the re-affirmation that, in Georgia, women's rights to liberty and privacy guarantee their freedom to make personal, private healthcare choices until a fetus reaches viability. Should a higher court divine a different, more restrictive meaning of liberty for the over five million women of Georgia, then this Court's ruling that the medical emergency exception that excludes mental health emergencies violates some Georgians' right to the equal protection of law must also be considered.

the time of the LIFE Act's passage.[34, 35]

SO ORDERED this 30th day of September 2024.

JUDGE ROBERT C.I. MCBURNEY
Superior Court of Fulton County

[34] As noted in the Court's 15 November 2022 Order, there is one statutory oddity created by this outcome. The prior (and now effective) version of O.C.G.A. § 16-12-141 requires a physician, before performing an abortion, to determine the "probable gestational age" of the fetus in accordance with O.C.G.A. § 31-9B-2. O.C.G.A. § 16-12-141(c)(1). However, as mentioned, Section 10 of the LIFE Act, which remains in place, supplanted references to "probable gestational age" in O.C.G.A. § 31-9B-2 with "presence of a detectable human heartbeat." That is the measure doctors must now take per O.C.G.A. § 31-9B-2, whereas O.C.G.A. § 16-12-141 once again requires doctors to determine gestational age. Until it is corrected, this statutory cross-reference will be somewhat nonsensical, but it does not make the overarching statutory framework regulating pregnancy terminations unworkable, impracticable, or unconstitutional. Physicians will simply need to make *both* determinations (and share both with their patients -- which, from the record established in this case, appears to be standard medical practice anyway).

[35] A recycled note on severability: the LIFE Act is severable -- at least in the manner it is being severed here (*i.e.*, Sections 4 and 11 excised from the remainder) -- for at least two reasons. First, the Act says so: H.B. 481 contained a severance provision (Section 14) invoking O.C.G.A. § 1-1-3, the Georgia Code's severability provision. That statute asserts that a "declaration or adjudication" such as that set forth in this Order finding one part of a legislative enactment unconstitutional "shall not affect the remaining portions of … such Act … which shall remain of full force and effect as if such portion so declared or adjudged invalid or unconstitutional were not originally a part of … such Act…." However, while "the presence of a severability clause ... reverses the usual presumption that the legislature intends the Act to be an entirety, and creates an opposite presumption of separability[,] the severability clause does not change the rule that in order for one part of [an Act] to be upheld as severable when another is stricken as unconstitutional, they must not be mutually dependent on one another." *Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 275 (2006) (punctuation and citation omitted). Here they are not. While all operative provisions of H.B. 481 spring from the common policy theme espoused in paragraph (6) of Section 2 of the Act (recognizing unborn children as natural persons), these provisions are not mutually dependent upon one another (other than Sections 4 and 11). Rather, they amend different statutory schemes to reflect the Legislature's determination that unborn children should enjoy the same rights and protections as the "born" do.